In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-899

McGRAW-EDISON COMPANY,
Petitioner,

vs.

BETTY SOPER AND JEFFSON INDUSTRIES, INC.,
Respondents.

BRIEF OF RESPONDENTS BETTY SOPER AND JEFFSON INDUSTRIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The only question presently before this Court is whether McGraw-Edison Company's Petition For Writ of Certiorari should be granted.

PRELIMINARY STATEMENT OF THE CASE

Respondents cannot accept the statement of the case contained in McGraw-Edison's Brief since it is not a fair and adequate statement to cover the issues.

This case involves three separate parties involved in actions against McGraw-Edison Company arising out of the purchase of Arnold Palmer Cleaning Center franchises. The original complaints were filed by James E. Northern and Shirley Northern in December of 1971. Jeffson In-

dustries, Inc. and Betty Soper were allowed to intervene in this action in the summer of 1972. Originally, the three separate cases each alleged one count of a violation of the Anti-trust laws, one count for fraud and misrepresentations of petitioner, and one count for punitive damages based on Count II-Fraud.

McGraw's Petition For Certiorari does not address any of the claims raised by the Northerns, or the verdict of the jury with respect to any of the claims for fraud and punitive damages.

THE RECORD

Respondents submitted lengthy testimony from Roy Jeffress, Betty Soper and approximately two weeks of testimony by Arnold Palmer Cleaning Center dealer, John Jacobson. In addition, respondents offered lengthy testimony by Thomas Eads, a man with in excess of 30 years experience in the sales, service and appraisal of dry-cleaning and laundry equipment and dry-cleaning businesses. Respondents also offered the testimony of Lawrence Cantrell who had in excess of 30 years' experience in all phases of sales, manufacture and appraisal value of signs and backdrops, in addition to lengthy deposition testimony of petitioner's national and regional sales managers, Richard Lester, Lincoln Bathrick and G. Richard Borcherding. Petitioner produced one witness Richard Lester, national sales manager of the APCCS Division.

On the Anti-trust counts of Jeffson Industries, Inc. and Betty Soper, it was agreed by all parties that the issues of economic power in the tying item and the issue that a not insubstantial amount of interstate commerce was affected by petitioner's tying arrangement, would be submitted to the Court. Prior to submitting this cause to the jury, the Court made its preliminary determination that respondents Betty Soper and Jeffson Industries had established sufficient economic power in the tying item, and that a not insubstantial amount of interstate commerce was affected so that the remaining issues on the Anti-trust claims of those intervenors were submitted to the jury. (Appendix B-5)

BACKGROUND

While reluctant to unduly lengthen the record before this Court, respondents feel it is necessary to clarify some misstatement of the factual background presented by petitioner.

The Arnold Palmer Franchise program began in 1964 when Petitioner through its American Laundry Machinery Industries Division (ALMI hereafter) established a subdivision—Arnold Palmer Cleaning Center Sales Division (hereafter APCCS). Petitioner's APCCS division was established to sell Arnold Palmer Cleaning Center franchise stores. The contract for the use of the Arnold Palmer name was signed prior to any investigation of the name by petitioner. ALMI division of petitioner was also the division which developed the Martinizing franchise program, the largest, most successful dry-cleaning franchise program. McGraw-Edison's ALMI Division, at the beginning of the AP franchise program, was the largest manufacturer of dry-cleaning and laundry equipment in the world, and the primary purpose for establishment of the AP franchise program, through the use of the Arnold Palmer name, was to obtain a competitive advantage over other dry-cleaning equipment manufacturers by tying the Arnold Palmer name to the sale of dry-cleaning equipment. The Arnold Palmer Cleaning

Center franchise was based on the concept that the "Arnold Palmer" name would insure a captive presold dry-cleaning market and enable petitioner to sell dry-cleaning machinery through the use of the AP franchise at excessive, non-competitive prices. AP franchisees could obtain the AP franchise and trademark only if they also purchased the package of dry-cleaning equipment and incidental materials from petitioner. As the unanimous opinion of the 8th Circuit Court of Appeals points out:

> "the record was replete with evidence that if Betty Soper and Jeffson Industries wanted the AP name, they were required to take the full package of equipment and execute the assignment and assumption forms." (Appendix A-15)

The Arnold Palmer franchise stores were sold through dealer-distributors nationally and in Canada. The APCCS franchise concept included financing through another McGraw-Edison subsidiary—EAC (Edison Acceptance Corporation), which division financed each of the tied sales to respondents Jeffson Industries and Betty Soper.

STATEMENT OF FACTS REGARDING JOHN R. JACOBSON

Prior to his involvement in the Arnold Palmer franchise program, John R. Jacobson was a resident of the Kansas City area where he was primarily involved in sales and rental of formal wear. Jacobson also had an interest in several dry-cleaning operations. None of the APCCS franchise stores in which Jacobson was involved ever included any aspect of the formal wear business.

Jacobson first became aware of the Arnold Palmer franchise program at the annual industry-wide National Institute of Dry-Cleaning Meeting in Atlantic City, New Jersey in early 1965. During that convention, Jacobson met with APCCS national sales manager, Richard Lester, and regional sales manager, Lincoln Bathrick, to discuss the Arnold Palmer franchise program. Shortly thereafter, Jacobson became an authorized Arnold Palmer dealer-distributor and was granted the Arnold Palmer dealership for the Western counties in the State of Missouri. Jacobson signed a dealer agreement with APCCS which imposed substantial limitation on Jacobson's activities in his Arnold Palmer dealership. After signing the dealer agreement, petitioner through its APCCS division, imposed additional limitations on the conduct of Jacobson's APCCS dealership and controlled the means and conduct by which Jacobson could sell AP franchises. Later, during the pendency of the AP franchise program, Jacobson's geographic area of distribution of AP franchises was extended to Kansas, Oklahoma and Colorado. Immediately following his appointment as an Arnold Palmer franchise dealer-distributor, Jacobson and one of his employees, Donald Dye, at the request and expense of petitioner, went to Cincinnati, Ohio, the principal office of petitioner's APCCS Division, for extensive training in sales techniques, which was provided by petitioner's national sales manager, Richard Lester, and other sales representatives. At that sales meeting in March of 1965 in Cincinnati, Lester and other sales representatives of APCCS gave an intensive program on sales techniques, the use of advertising and sales brochures, company policy on how sales were to be conducted, the use and execution of sales forms, how to fill out and complete franchise agreements, assignment forms of those franchise agreements, financial projections provided by petitioner and other matters regarding the sale of AP franchise stores. Following the national sales meeting in March of 1965, AP regional sales managers came to Kansas City

on various occasions to give further detailed instructions to Jacobson on the sales methods to be utilized in the AP franchise program. This program of intensive sales training, including national sales meetings, regional sales meetings and local visits with regional sales managers, continued during the entire term of Jacobson's tenure as an AP franchise dealer. During each of the various sales meetings, the precise sales techniques to be used by the AP dealers were reviewed in detail and the dealers, including Jacobson, were trained intensively in the preparation of the forms. Shortly after Jacobson's meeting with APCCS personnel in Cincinnati in 1965, Jacobson received a complete set of forms from APCCS for his use in selling franchises including sales brochures, assignment and assumption forms, financial projections forms with figures from petitioner, promissory note forms, location analysis forms, a sales presentation book which included package price lists and information on the equipment to be included in the AP franchise packages.

At or about the beginning of the AP franchise program and through 1971 when sales of AP franchises were discontinued by petitioner, good retail locations were difficult to obtain and the retail market in dry-cleaning machinery was extremely competitive. ALMI Division of petitioner and APCCS franchise division of petitioner were in competition with numerous other franchises and dry-cleaning manufacturers for the sale of equipment in good retail locations. Knowing the difficulty in obtaining good retail locations, petitioner encouraged its AP dealers to obtain good AP franchise locations and make lease commitments on those locations prior to finding AP franchisees. Consistent with that policy of petitioner McGraw-Edison, Jacobson was encouraged to obtain good franchise locations and place AP franchise stores into operation at those locations for later resale to franchisees when they could be

located in the Kansas City area. The sale-resale of the AP franchise stores by McGraw-Edison was implemented by the use of the various assignment and assumption forms prepared by petitioner for distributor use, all of which were forwarded to Jacobson shortly after his appointment as an AP dealer. In each of the sales to Jeffson Industries and Betty Soper, the exact same assignment-assumption form was used in each tied sale. In each tied sale to intervenor Jeffson Industries and Betty Soper, McGraw-Edison controlled the means of the sale per the documents to be used and received a continuing benefit from the sales through dealer Jacobson in the form of payments to McGraw-Edison's EAC Division and its APCCS Division in franchise payments. In addition, McGraw-Edison, through other AP dealers in other parts of the country, utilized the same sale-resale mechanism in selling AP franchises.

Consistent with McGraw-Edison's encouragement-policy for AP dealers to obtain good locations, establish AP franchise stores and later sell them to franchisees, in 1965, John Jacobson opened the first AP franchise store in the Kansas City area at 95th and Blue Ridge. Consistent with the instructions of petitioner, this AP store was to be a "demonstrator" store so that prospective franchisees could view the equipment and the total AP franchise package in operation. Later in 1966, consistent with that same policy of McGraw-Edison, Jacobson opened two other AP locations for resale in Gladstone, Missouri and in Liberty, Missouri.

Under Missouri law a person or entity purchasing property for resale is not required to pay state sales tax. Therefore, in light of the sale-resale practice of petitioner, Jacobson was not required to pay sales tax on several of the AP stores purchased for resale and he received

credit memos from petitioner on other resale franchise stores purchased because APCCS Division of McGraw-Edison recognized the tax exemption certificate and realized that Jacobson was holding those stores for resale. Consistent with this fact, APCCS' regional and national sales managers attempted to aid Jacobson in selling those three AP franchise stores, as such, at a franchise show in Kansas City in 1967. Prior to the franchise show, the regional sales manager reviewed and approved newspaper advertising of those three locations as available AP franchise locations.

In each of the sale-resales to respondents Jeffson Industries and Betty Soper, Jacobson followed exactly the same procedure as dictated by APCCS Division of McGraw-Edison and used the sale-resale mechanism (assignment-assumption forms) prescribed by petitioner. In each of the sales, the franchisees—Jeffson Industries and Betty Soper—were informed they could not have the AP name (tying item) without the execution of the assignment of the franchise-lease agreement and the assumption of the equipment note to EAC Division of McGraw-Edison. The franchise agreement and sign and backdrop lease agreement were physically attached to each other and incorporated by reference so that the assignment of the sign and backdrop lease agreement was an effective assignment of the full body of both the franchise agreement and the sign and backdrop lease agreement. On three different occasions, utilizing forms provided by APCCS Division of McGraw-Edison, and following procedures dictated by APCCS Division of McGraw-Edison, Jacobson assigned the franchise-lease agreement and assumption agreement to Jeffson Industries and on one occasion to Betty Soper. In each tied sale, the same procedure was followed and McGraw-Edison was able to effect a tying arrangement through Jacobson by use of the assignment-assumption

forms. The course of conduct of McGraw-Edison in dealing through AP franchise dealers in the sale-resale of the franchise stores to Jeffson Industries at Noland Plaza, Blue Ridge and Gladstone and the AP franchise store to Betty Soper at Liberty Landing, clearly were not isolated sales of an existing business, but part of a designed course of conduct by McGraw-Edison to sell dry-cleaning equipment and the other tied items through the power of the AP franchise.

STATEMENT OF FACTS REGARDING BETTY SOPER (LeMASTER)

E. Grant LeMaster and Betty LeMaster were interested in purchasing a small family business in 1968. At that time, they came into contact with Robert Sanders, Jacobson's sales agent for AP franchise locations. Mr. and Mrs. LeMaster met with Jacobson in 1968 to discuss the AP franchise location located at Liberty Landing, Missouri. At that time, after reviewing the sales brochures and other sales presentation materials with Jacobson, it was represented to the LeMasters that if they wanted to become part of the AP franchise program, and obtain the AP franchise location at Liberty Landing, they would be required to execute both the assignment-assumption forms provided by APCCS Division of petitioner on the equipment, and the assignment of the backdrop lease agreement. Again, Jacobson made the same representations to Mr. and Mrs. LeMaster regarding the AP franchise store, and Jacobson utilized the sales brochures in making this presentation. In the fall of 1968, the LeMasters did purchase the Liberty Landing AP franchise store and thereafter did execute the described assignment-assumption forms. The LeMasters operated the Liberty Landing AP franchise store until early 1970, when Mr. LeMaster

died. Thereafter, Mrs. LeMaster (Betty Soper) owned and operated the Liberty Landing store.

STATEMENT OF FACTS REGARDING JEFFSON INDUSTRIES, INC.

Roy and Catherine Jeffress were originally from central Missouri where Roy Jeffress was involved in agricultural businesses. The Jeffress family moved to the Kansas City area in 1963. At that time, the Jeffress family and Jacobson formed Jeffson Industries. Jeffson Industries began a chain of coin operated car washes in 1963. The primary capital expenditure in the formation of Jeffson Industries, Inc. was provided by the Jeffress family. In late 1966, or early 1967, the principals of Jeffson Industries became interested in the dry-cleaning business and Jacobson talked with Roy Jeffress on numerous occasions regarding the AP franchise program. During those meetings, Jacobson went over the various sales brochures and other sales materials provided by APCCS Division of McGraw-Edison. At that time, consistent with APCCS' sale-resale policy on AP franchise stores, Jacobson had obtained a lease commitment on a site in Noland Plaza, Independence, Missouri. Consistent with APCCS' sale-resale policy, an AP franchise store package was installed at the Noland Plaza location in the summer of 1967, and in September, 1967, Jacobson, utilizing the assignment-assumption forms provided by APCCS, and following procedures dictated by APCCS Division of McGraw-Edison, assigned the franchise-lease agreement on the Noland Plaza store to Jeffson Industries. The fact that the original franchise-lease agreement had been executed on the same day by Jacobson clearly establishes the sale-resale policy and distribution scheme of APCCS Division. On the occasion of each sale or resale of AP franchise stores by Jacobson to Jeffson

Industries, Roy Jeffress was told, if you want the AP name-franchise you must also take the prescribed package of equipment, including the sign and backdrop and other tied items. Throughout the period of sales of AP franchise packages, APCCS Division's policy of selling the franchise as a "package deal" was clear.

In late 1968, Jeffson Industries again became interested in expanding their holdings and Roy Jeffress again talked to Jacobson regarding the Blue Ridge AP store and the Gladstone AP store. In discussing the Gladstone and Blue Ridge AP stores, Jacobson again stated to Jeffress that if Jeffson Industries wanted the AP name and identification on the Blue Ridge and Gladstone stores, that Jeffson Industries would be required to execute the same assignment-assumption forms as required by APCCS Division of McGraw-Edison in the Noland Road purchase. In January, 1969, Jeffson Industries purchased the Blue Ridge AP location utilizing the assignment-assumption forms provided by APCCS. In August of 1969, again utilizing the same assignment-assumption forms, Jeffson Industries purchased the Gladstone AP franchise store. In 1971, Jeffson Industries purchased all of John Jacobson's interest in Jeffson Industries.

In each of the aforementioned sales or resale-assignments, McGraw-Edison's agent Jacobson followed the precise procedure dictated by APCCS Division of McGraw-Edison and used the same sale-resale forms prescribed by APCCS. In each of the sales, the franchisees—Jeffson Industries and Betty Soper—were informed that they could not have the AP name (tying item) without the execution of the assignment-assumption forms which included the assignment of the franchise-lease and the assumption of the equipment note to EAC Division of McGraw-Edison. Thus, on four different occasions, McGraw-Edison through

its various divisions, utilizing its agent Jacobson and the various forms, was able to effect tying arrangements with Jeffson Industries and Betty Soper. On each occasion, the exact same procedure was followed. It cannot be said that the four tied sales were isolated sales of businesses, but a designed course of conduct by APCCS Division of McGraw-Edison, through Jacobson, to sell dry-cleaning equipment and the other tied items through the power of the AP franchise name. The Noland Road tied sale by petitioner to Jeffson Industries, Inc. was not submitted to the jury and the jury verdict for Jeffson Industries applied only to the Blue Ridge and Gladstone Arnold Palmer dry cleaning franchise stores.

ARGUMENT

Response to Petitioner's Legal Contentions

Petitioner, McGraw-Edison Company, seeks to have this Court issue a Writ of Certiorari to review the judgment entered by the Eighth Circuit Court of Appeals in the above entitled action.

The only ground upon which petitioner seeks review by this Court is on spurious claims of conflict among the circuits, as to issues raised in the petition, as asserted by petitioner. Mere assertion that such a conflict exists does not provide the necessary basis for granting such petition.

Rule 19(b) of the Rules of the Supreme Court of the United States provides in pertinent part as follows:

> "A review on a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special reasons therefore. The following while neither containing nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) . . .
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ."

McGraw-Edison Company, petitioner herein, seeks to invoke the discretionary power of this Court, to review the decision of the Eighth Circuit in this action. Petitioner relies on an alleged conflict among the circuits to assert a basis for this Court to invoke its sound judicial discretion, and review the action of the Eighth Circuit Court of Appeals.

Certiorari will be granted by the United States Supreme Court only in cases involving principles, the determination of which is of importance to the public as distinguished from the parties, and in cases where there is a real conflict of opinion and authority among the United States Circuit Courts of Appeal. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

Certiorari will not be granted where the case requires no general pronouncement, but merely involves its own unique circumstances. *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. 430, 70 S.Ct. 226, 94 L. Ed. 236. Petitioner apparently seeks review in its petition for writ of certiorari on grounds which are unique and would apply only to this case. Petitioner does not state as grounds for its petition any issue which can be construed as a general pronouncement of an important principle of law.

No conflict among the circuits exists regarding the questions presented and the petition for writ of certiorari should, therefore, be denied.

Petitioner does not seek to resolve any conflict among the circuits, but to have this Court review the evidence adduced in this action at trial, and the inferences to be drawn from such evidence. It is clearly established that the Supreme Court will not grant a petition for writ of certiorari merely to review evidence and the inferences to be drawn from such evidence. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 58 S. Ct. 849, 82 L. Ed. 1273.

Under the caption, "Reasons For Granting The Writ", petitioner sets forth its pronouncement of the issues, and authority in support, on which it bases its petition for writ of certiorari. Respondents submit that there is no conflict among the circuits regarding the issues involved in this action and therefore no basis for this Court to accept certiorari for the reasons set forth below.

I.

No Conflicts Exist Among the Circuits As to the Application of the Per Se Rule to Tying Arrangements

Petitioner relies on *GTE Sylvania Incorporated* v. *Continental TV, Inc.*, 537 F.2d 980 (9th Cir. 1976), and *Susser* v. *Carvel Corporation*, 332 F.2d 505 (2nd Cir. 1964), to support its contention that even "if the licensing of the use of the name of 'Arnold Palmer' is a 'tying product', the resultant 'tying arrangement' does not necessarily unreasonably restrain competition." Thus, petitioner seeks to undermine and attack the basic concept of the "per se" doctrine as enunciated by this Court on numerous

occasions from and after the case of *Northern Pacific Railway* v. *U. S.*, 356 U.S. 1.

In *GTE Sylvania Incorporated* v. *Continental TV, Inc.*, supra, the 9th Circuit held that locations agreements imposed by a manufacturer, which had only a small percentage of the total market, in which many other brands were available to consumers, which gave its dealers no veto power against franchising of additional dealers in a given area, which permitted its dealers to carry competing brands, and which had no demonstrable effect on prices, volume of products available, quality, or consumer choice, and did not foreclose any consumer from substantive choice among several dealers, should have been judged under the rule of reason test rather than a test of per se illegality. The Court went on to say that implicit in the application of a per se rule is the conclusion that the particular practice necessarily involves an unreasonable restraint upon competition, and thus can conclusively be presumed to be illegal. Nowhere in the extensive opinion of the Ninth Circuit is the per se doctrine as applied to tying cases rejected. Specifically at footnote 34 the Ninth Circuit quotes the opinion of the Court in *White Motor Co.* v. *United States*, 372 U.S. 253, 265-266, 83 S. Ct. 696, 9 L. Ed. 2d 738:

> "Specifically, the per se rule of prohibition has been applied to price fixing agreements, group boycotts, *tying arrangements*, and horizontal division of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition." (Emphasis added)

Susser v. *Carvel Corporation*, 332 F.2d 505 (2nd Cir. 1964), the second case relied on by petitioner, did involve

claims of an illegal tying arrangement. The Court held that plaintiffs could not establish a per se violation of the anti-trust laws, when they failed to establish the franchisors' market dominance or that a substantial amount of commerce was affected. The Court in *Susser* did not question the validity of the per se rule where the elements of a per se violation have been established, as is clearly the situation in this case.

Tying arrangements constitute a per se violation of §1 of the Sherman Act where the evidence establishes certain essential elements:

(1) That an individual has actually tied two separate and distinct products into a single package. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 614.

(2) The individual possesses sufficient economic power in the tying product market to appreciably restrain competition. *Northern Pacific Ry.* v. *United States,* 356 U.S. 1

(3) Finally, that the arrangement affects a "not insubstantial" amount of interstate commerce. *Northern Pacific Ry.* v. *United States,* supra.

Where the evidence establishes these essential elements, the plaintiff has proved a per se illegal violation, and there need not be further judicial inquiry as to whether any unreasonable competitive effects result. *Northern Pacific Ry. Company* v. *United States,* supra; *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495.

The Eighth Circuit clearly found present in this action evidence which established all of the elements of a tying arrangement, which have historically been considered a per se violation. See Opinion of the Eighth Circuit, Appendix page A-19:

"Plaintiffs' evidence in this case inexorably indicates that defendants' tying arrangement constituted a per se violation of §1 of the Sherman Act."

No conflict among the circuits exists as to the application of the per se rule in tying arrangements, and the resulting anticompetitive effects of such illegal arrangements. Petitioner cites no authority which supports this Court's undermining the "per se" doctrine as it applies to "tying arrangement" cases.

II.

The Individual Must Possess Sufficient Economic Power in the Tying Product to Appreciably Restrain Competition; No Prior Relationship to the Product Need Be Established

Petitioner's second contention is wholly *erroneous.* It appears that petitioner asserts that in order to constitute a violation of §1 of the Sherman Act the trade name of a franchise must have a prior relationship to the equipment or product to be sold. This contention is totally without legal authority or merit.

All that is necessary, as set forth previously, with regard to the tying product, is that the individual possess sufficient economic power in the tying product to appreciably restrain competition. *Northern Pacific Ry.* v. *United States,* supra. It is clear that the trial court and the Court of Appeals found that the Arnold Palmer trademark was a separate item and that petitioner possessed sufficient economic power in the AP name to restrain competition. (Appendix A-17)

Apparently, petitioner seeks to have this Court draw the inference, from the evidence or as a matter of law, that McGraw-Edison did not have such economic power.

Such a position is not in accordance with governing legal principles or the facts as determined upon review of this action by the Eighth Circuit Court of Appeals.

This Court will not grant a petition for a writ of certiorari merely to review the evidence or the inferences to be drawn from the evidence. *General Talking Picture Corp.* v. *Western Electric,* supra.

III.

Proof That Purchase of One Product Was Conditioned Upon the Purchase of Another Constitutes Coercion

McGraw sets forth as a basis for granting of its petition for a writ of certiorari the claim that there was no proof of individual coercion, and that this is in conflict with other circuits.

In support of that contention petitioner cites *Ungar* v. *Dunkin Donuts of America, Inc.,* 531 F.2d 1211 (3rd Cir. 1976) and *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307 (5th Cir. 1976).

Ungar v. *Dunkin Donut of America, Inc.,* supra, involved an interlocutory appeal under §1292(b) of Title 28, United States Code, from a class certification by the District Court. In rejecting the District Court's certification of the class, the Third Circuit held that the certification of the class with respect to the tying claims was expressly premised on its erroneous rejection of the individual coercion doctrine. Such doctrine requires each member of the "franchised class" to prove that his purchases were "coerced", as an essential element of establishing a case of illegal tying. The Court in *Ungar,* at page 1224 set forth the principle as follows:

> "But in the absence of a formal agreement a plaintiff must establish in some other way that a tie in was involved and not merely the sale of two products by a single seller. This can be done by proof that the purchase of one product, the tied product, was not voluntary, i.e., by proof of coercion."

Simply put, the Third Circuit in *Ungar* held that a voluntary purchase of two separate products from a single seller does not constitute an illegal tying arrangement.

So long as the buyer is free to take either product by itself there is no illegal tying arrangement. *Northern Pacific Ry.* v. *United States,* supra, 356 U.S. at page 6.

As this Court held in *Times-Picayune Publishing Co.* v. *United States,* supra:

> "By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of a buyer's independent judgment as to the tied product's merits and insulates it from the competitive stresses of the open market."

In *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* supra, the Fifth Circuit held with respect to the tying claim the franchisees failed to introduce sufficient evidence to establish their decision to purchase two separate products from a single franchisor was *coerced.*

Coercion in this context relates to voluntariness as opposed to actual force. Proof that the purchase of one product was conditioned upon the purchase of another is sufficient evidence to show coercion. See *United States* v. *Paramount,* 68 S. Ct. 915 wherein the Court held:

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted."

The Eighth Circuit clearly held that the purchase of the Arnold Palmer trademark was conditioned upon the purchase of the tied product. From the opinion of the Eighth Circuit as set forth in the Appendix at page A-15:

> "However, the record is replete with evidence that the prospective franchisees could obtain the franchise and trademark only if they also purchased the package of dry-cleaning equipment and incidental materials from defendant."

Petitioner's contention in this respect is wholly without merit. Not only did the Eighth Circuit find coercion, but this case presents no conflict among the circuits on this issue.

IV.

Scheme of Distribution Involving Sales of Tied Products Constitutes a Violation of the Anti-Trust Laws

Finally, petitioner contends that the sale of an "existing facility" including equipment tied to the right to use a franchised name does not constitute an illegal tying arrangement. Petitioner relies on *Beefy Trail, Inc.* v. *Beefy King International, Inc.*, 348 F. Supp. 799 (M.D. Fla. 1972).

No conflict exists among the circuits as to the holding in *Beefy Trail*, which is totally consistent with the decision in this action. In fact, the Eighth Circuit correctly noted that the entire holding in *Beefy Trail* specifically condemned the exact practices used by petitioner in the transactions with respondents. (Appendix A-15, 16)

In fact, all the circuits which have considered this question have cited the *Beefy Trail* case, and held as did the Eighth Circuit in this case. This consistent finding

is clearly reflected in *Carpa, Inc.* v. *Ward Foods, Inc.*, 516 F.2d 39 (5th Cir. 1976) which demonstrates that no conflict exists between the Fifth Circuit and the Eighth Circuit, as to this issue. *Carpa* was an action by seafood restaurant franchises to recover damages for an alleged tying arrangement. Defendant therein contended that certain work done, and equipment ordered, prior to the plaintiffs' involvement were necessarily part and parcel of the franchise itself. In support of their argument the defendant in *Carpa* cited *Beefy Trail,* which involved the sale to a franchisee of a completely equipped restaurant which had been in operation more than six months. The district court held that such a sale in "*isolation*" did not constitute a tying arrangement (emphasis added). In *Carpa,* the Court of Appeals pointed out that *Beefy Trail* went on to hold at page 807:

> "Although an isolated sale of equipment located in an established restaurant does not constitute a tying arrangement, a different situation might exist under the circumstances where the franchisor by an intentional course of conduct seeks to circumvent the antitrust laws concerning tying arrangements by requiring a franchisee to purchase a restaurant and its equipment previously established. . ."

The Fifth Circuit found, that had franchisees executed agreements before the first nail was ordered, each would have been required to obtain the same items they eventually received. The Court in *Carpa* went on to say at page 46:

> "This is precisely the practice condemned in Beefy Trail."

And this is precisely the practice condemned by the Eighth Circuit in the present action. Judge Gibson noted in his opinion as set forth in the Appendix page A-4:

> "Favorable locations for AP Centers were hard to find and, since a dealer had not always secured a willing buyer of a franchise when a good location became available, APCCS encouraged Jacobson and other dealers to utilize a purchase-resale procedure as a method of distributing AP Centers. Pursuant to this procedure, a dealer would select a favorable location for an AP Center and secure confirmation of his selection from APCCS. Upon confirmation, the dealer would personally execute a lease for the location. The dealer would then enter into a franchise agreement with APCCS, which authorized the dealer to use the name 'Arnold Palmer' in association with the dry-cleaning business for a period of five years. Finally, the dealer would execute a Sign and Backdrop Lease Agreement with APCCS which permitted the dealer to place a large 'Arnold Palmer Cleaning Center' sign on the exterior of the building and to use a specially designed backdrop in the interior. The dealer would also arrange to make the AP Center operational by purchasing all equipment from APCCS at dealer's cost. In most instances the dealer would finance the equipment purchase through Edison Acceptance Corporation (E.A.C.), which, like APCCS, was a subsidiary of defendant McGraw. The dealer would thereafter attempt to sell the AP Center as a 'package deal' to prospective franchisees . . ."

An isolated sale of an existing facility is not involved in this litigation. What is involved is a franchise distribu-

tion system designed by petitioner, wherein petitioner encouraged a sale-resale transaction. From the opinion of the Eighth Circuit at (A-16):

> "We stress what this case does not involve. This is not a situation where there was an isolated sale of a going business whereby the buyer was obligated to purchase the entire operational package. Rather, this case presents a deliberate distribution scheme in which dealer/agents were initially sold a package comprised of a tying product and numerous tied products and then were encouraged to distribute these 'packages' to prospective franchisees."

No conflict exists among the Circuits as to this issue. It is the substance of the transaction, not its form which will govern its legality or illegality under the anti-trust laws. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 352; *Simpson* v. *Union Oil Company*, 396 U.S. 13.

CONCLUSION

McGraw-Edison's Petition for Writ of Certiorari should be denied for the reason that no issue exists, in this litigation, upon which there is a conflict of opinion among the Circuits, Petitioner's contentions in this respect are erroneous and without factual or legal justification. Further, there is no other reason which warrants this Court's granting the Petition for Writ of Certiorari.

WHEREFORE, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the above and foregoing was mailed this 25th day of January, 1977 to Malcolm D. Young, 1500 City National Bank Building, Omaha, Nebraska and Jerome F. X. Waterman, 812 Midland Bank Building, Kansas City, Missouri, attorneys for Petitioner.

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